



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

September 8, 2003

Mr. Mark E. Dempsey
Assistant City Attorney
City of Garland
P.O. Box 469002
Garland, Texas 75046-9002

OR2003-6296

Dear Mr. Dempsey:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187207.

The City of Garland (the "City") received a request for information relating to a recent survey of the police department. You indicate that you have released some of the requested information, but argue that the remainder of the requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you raise and reviewed the submitted information.

We first address your concern that the requested information is confidential because "the survey guaranteed the respondents that their responses and comments would be anonymous." This office has long held that a governmental body's promise to keep information that is subject to the Public Information Act (the "Act") confidential is not a basis for withholding that information from the public, unless the governmental body has specific statutory authority to keep the information confidential. *See* Open Records Decision Nos. 514 at 1 (1988), 479 at 1-2 (1987), 444 at 6 (1986). You do not inform us that the City has such authority. Furthermore, information that is subject to the Act is not confidential simply because the party submitting the information anticipates or requests confidentiality. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Thus, the City may not withhold the information at issue from the requestor because the survey was "guaranteed" to be confidential.

The submitted information included an Internal Auditor Report that is subject to section 552.022 of the Government Code. Section 552.022(a) provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted documents includes a completed report which must be released to the requestor pursuant to section 552.022(a)(1), unless it is expressly confidential under other law or are excepted from disclosure under section 552.108 of the Government Code. We note that section 552.111 of the Government Code is a discretionary exception to disclosure under the Act that protects the governmental body's interests and may be waived.¹ As such, section 552.111 is not other law that makes information confidential for the purposes of section 552.022(a). Accordingly, we conclude that the City may not withhold the completed report under section 552.111 of the Government Code.

You argue that the Internal Auditor Report contains information protected from disclosure under section 552.101. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrines of common law and constitutional privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. After reviewing the information, we find that it is not intimate or embarrassing as outlined in *Industrial Foundation*. *Id.* We also find that it is of legitimate public concern. Therefore, the City may not withhold the highlighted information in the report under section 552.101 of the Government Code.

We next address your contention that the remaining requested information is excepted under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See Open Records Decision Nos. 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

party in litigation with the agency.” The purpose of section 552.111 is to protect advice, opinion, and recommendation used in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Dep’t of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from public disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5 (1993). A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (holding that personnel-related communications not involving policymaking were not excepted from public disclosure under section 552.111); *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). But a governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Furthermore, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5 (1993). However, if the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, that information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

In this instance, you explain that the survey questions were posed in order “to encourage frank and open discussion within the [police] department regarding existing management issues and policies, in order to evaluate and improve those policies.” We agree that the survey responses relate to the police department’s policymaking functions. *See* Open Records Decision No. 631 (1995). We have previously held, however, that similar information reflecting the compilation of a survey’s results were not protected by section 552.111. That conclusion was based on the fact that the compiled results were not part of the decisional process. Open Records Decision Nos. 464 at 4 (1987) (releasing compiled survey responses to declarative statements), 209 at 3 (1978). Furthermore, we stated that “[a]lthough these responses may reflect the subjective opinion of the evaluator, their release will not impair the deliberative process...because the questions are anonymous.” ORD 464 at 4-5; *see also* Open Records Decision No. 482 at 7 (1989) (releasing subjective responses to declarative statements), 206 (1978). We have, nevertheless, found that narrative responses may be withheld under section 552.111. ORD 464 at 5. These comments are not necessarily anonymous, are less factual in nature, and may reflect the respondent’s advice or opinion. ORD 209 at 2. Consequently, we find that only the narrative comments may be withheld under section 552.111. The rest of the information is not excepted under section 552.111.

We note that the submitted materials contain information that is excepted from disclosure under section 552.117(a)(2).² The City must withhold those portions of the records that reveal an officers' home addresses, home telephone numbers, or social security numbers. The City must withhold this information from disclosure under section 552.117(a)(2). We have marked the documents accordingly.

The submitted documents also contain a personal e-mail address. Section 552.137 makes certain e-mail addresses confidential. Section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that the individual has affirmatively consented to the release of his e-mail address. The City must, therefore, withhold the e-mail address under section 552.137.

In summary, the City may withhold only the narrative comments of the submitted surveys under section 552.111 of the Government Code. The marked e-mail address must be withheld pursuant to section 552.137. We have marked certain personal information related to the officers, which must also be withheld under section 552.117(a)(2). The City must release the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

² In Senate Bill 1388, which became effective on June 20, 2003, the Seventy-eighth Legislature recently amended section 552.117 of the Government Code by adding "(a)" to the relevant language of this provision. *See* Act of May 30, 2003, 78th Leg., R.S., S.B. 1388, § 1 (to be codified as an amendment to Gov't Code sec. 552.117).

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Heather R. Rutland", written in a cursive style.

Heather R. Rutland
Assistant Attorney General
Open Records Division

HRR/sdk

Ref: ID# 187207

Enc: Submitted documents

c: Mr. Richard Abshire
The Dallas Morning News
Garland Bureau
613 State Street
Garland, Texas 75040
(w/o enclosures)